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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92048667
Party	Plaintiff Jules Jurgensen/Rhapsody, Inc.
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Attachments	09-09-17 JJ's Combined Mot to Strike.pdf ( 4 pages )(40418 bytes )

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Jules Jurgensen/Rhapsody, Inc.,	)	
	)	
Petitioner,	)	Cancellation No. 92048667
	)	
v.	)	
	)	
Peter Baumberger,	)	
	)	
Respondent.	)	

PETITIONER'S COMBINED  
(1) MOTION TO STRIKE RESPONDENT'S REPLY, AND  
(2) BRIEF IN REBUTTAL TO  
RESPONDENT'S REPLY IN SUPPORT OF MOTION FOR JUDGEMENT AND  
OPPOSITION TO PETITIONER'S REQUEST FOR RECONSIDERATION

Petitioner's Motion to Strike

Respondent's Reply in Support of Motion for Judgement and Opposition to  
Petitioner's Request for Reconsideration should be stricken because of its untimely  
filing.

The due date for filing Respondent's Reply in Support of Motion for Judgement  
and Opposition to Petitioner's Request for Reconsideration was Tuesday, September 1,  
2009.

It was served and filed on Tuesday, September 8, 2009.

According to Trademark Rule 127(b),

" a brief in response to a [request for reconsideration] must  
be filed within 15 days from the date of service of the  
request."

Petitioner's Request for Reconsideration was filed and served electronically on Sunday, August 16, 2009, the day before the Board ordered the Request to be filed. It was in Respondents's possession on Monday, August 17, 2009.

Accordingly, the due date for Respondent's Reply in Support of Motion for Judgement and Opposition to Petitioner's Request for Reconsideration was Tuesday, September 1, 2009.

Even if it is construed that Respondent is entitled to the additional three days permitted by Fed. R. Civ. P. 6(d), the due date would have been Friday, September 4, 2009.

Respondent has not offered any justification for its untimely filing.

Accordingly, the Board should strike Respondent's Reply in Support of Motion for Judgement and Opposition to Petitioner's Request for Reconsideration.

Petitioner's Request for Reconsideration has been Conceded by Respondent

Respondent's Reply in Support of Motion for Judgement and Opposition to Petitioner's Request for Reconsideration should properly be stricken as being untimely filed for the reasons just stated.

For the consequences of Respondent's untimely filing, Petitioner's Request for Reconsideration should be regarded as a motion. This is because in all respects, including scheduling, and response it is treated as a motion.

Accordingly, Petitioner's Request for Reconsideration should be regarded as conceded by Respondent and thus should be granted.

Thus, Trademark Rule 127 (a) states that:

"When a party fails to file a brief in response to a motion, the Board may treat the motion as conceded."

### Petitioner's Rebuttal Brief

\_\_\_\_ Respondent's arguments in opposition to Petitioner's Request for Reconsideration are not well taken and should be ignored.

First, Respondent's comment that the allegations of Petitioner's attorney about the events of March 4, 2009, are not challenged. Accordingly, they are conceded.

Second, the alleged requirement, created by Respondent, that the allegations need to be supported by a declaration not well taken. This is because every paper filed in a the United States Patent and Trademark Office is filed under the Rules 1.4(d)(4) (*Certifications*) and 11.18(b)(*Signature*).

The reference in Rule 11.18(b)(1) to the penalties set forth under 18 U.S.C.1001 is sufficient to meet any alleged requirement for a "declaration."

Third, the cases relied upon by Respondent have no relevance to the case at bar.

Thus the *Amoco Oil* case relates to an attempt to correct a deficiency in testimony, not to support a request for reconsideration.

The *Electronic Data System Corp.* case is not relevant since it addresses, in note 5 relied upon by Respondent, an attempt to correct deficiencies in the trial brief, not an argument in support of a request for reconsideration.

The *Abbott Laboratories* case relates to the introduction of scientific matter without a supporting declaration, not a statement by an attorney under the provisions of Rules 1.4(d)(4) and 11.18(b).

Fourth, Respondent has failed to offer any explanation that would justify its misleading and deceptive conduct in connection with helping Petitioner in arranging the deposition of Mr. Clayman.

Thus, by its conduct, Respondent has waived, acquiesced and encouraged the acts of which it now complains.

Accordingly, Petitioner's Request for Reconsideration should be granted.

Jules Jurgensen/Rhapsody, Inc.

/Stuart E. Beck/  
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The undersigned Certifies that on September 17, 2009 copies of Petitioner's Combined (1) Motion to Strike Respondent's Reply, and (2) Brief in Rebuttal to Respondent's Reply in Support of Motion for Judgement and Opposition to Petitioner's Request for Reconsideration was sent by email to Andrea Anderson, the attorney for the Respondent at Aanderson@hollandhart.com, and by first class mail, postage prepaid at:  
Holland & Hart  
One Boulder  
1800 Broadway, Suite 300  
Boulder, CO 80302

/Stuart E. Beck/  
Stuart B. Beck, Esq.